Filed 8/7/19 P. v. Davis CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DAVIS, Defendant and Appellant.	B288595 (Los Angeles County Super. Ct. No. NA099278)

APPEAL from a judgment of the Superior Court for Los Angeles County, James D. Otto, Judge. Reversed in part, and affirmed as modified.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert Davis appeals from a judgment sentencing him to 90 years in prison after a jury found him guilty of first degree murder (Pen. Code,[1] § 187, subd. (a)), conspiracy to commit murder (§ 182, subd. (a)(1)), attempted willful, deliberate, and premeditated murder (§§ 664/187, subd. (a)), possession of a firearm by a felon (§ 29800, subd. (a)(1)), and stalking (§ 646.9, subd. (a)), and found that he personally used and discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)) as to the murder and attempted murder counts. Defendant contends the trial court committed reversible error by admitting two hearsay statements related to the attempted murder and by precluding defendant from eliciting testimony regarding the murder victim's alleged gang membership. He also contends there was insufficient evidence to support the jury's finding that he personally used a firearm in committing the murder. Finally, he contends the trial court erred in imposing a 15-years-to-life sentence for the attempted murder count.

We find no error or abuse of discretion in the trial court's evidentiary rulings. However, we agree there was insufficient evidence to support the jury's finding that defendant personally used a firearm in committing the murder; we also agree the trial court imposed an incorrect sentence on the attempted murder count. Accordingly, we strike the firearm use sentence enhancement with regard to the murder count and modify the sentence on the attempted murder count to life in prison; we remand the matter to the trial court with directions to

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1 Further undesignated statutory references are to the Penal Code.

prepare an amended abstract of judgment reflecting these modifications of the judgment.

BACKGROUND

Our discussion of the facts is limited to those facts necessary to address the issues defendant raises on appeal. Unless otherwise specified, all dates are from the year 2012.

A. *Events Leading Up to the Attempted Murder*

Defendant, who was known as "J.J.", and Sharon Davis (Sharon)[2] were married in 1988, and had six children together; Sharon also has two sons from a prior relationship. Defendant was abusive during the marriage, and committed multiple acts of domestic violence against Sharon. He also assaulted Sharon's son Pierre while Pierre was living in defendant's and Sharon's home in Los Angeles.

Sometime in 2010 or 2011, Sharon met Jasper Dukes, and they began dating. In December 2011, Sharon moved out of her home with defendant and moved into an apartment in Inglewood. She did not give defendant her new address. Pierre lived with her for a time, and Dukes sometimes spent the night at the apartment, but he did not live there; he lived in Compton at his mother's home.

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[2] Because the members of defendant's family share the last name Davis, we refer to each member by his or her first name to avoid confusion; we mean no disrespect.

Defendant was upset that Sharon had moved out and was seeing another man. He immediately started searching for her, and repeatedly called her, to try to get her back. He asked his daughter-in-law, Patricia Davis, who owns a credit company and is a skip tracer, to run credit reports and locate the addresses for Sharon's apartment and Dukes' home. Defendant also purchased several GPS tracking devices from Rocky Mountain Tracking and placed most of them on vehicles owned by Sharon or members of her family.[3]

On January 25, defendant showed up unexpectedly at Sharon's apartment while Dukes was there. Defendant confronted Sharon, and a scuffle ensued, during which Sharon fell or was pushed to the ground and suffered scratches to her face. Defendant took Sharon's phone and ran off. Sharon's neighbor called the police. In the meantime, defendant also called the police and reported that a man had pointed a gun at him from Sharon's apartment window and threatened to kill him.

When the police officers arrived, Sharon told them about the incident and that defendant had taken her phone. She testified that she also told them that she had filed for a restraining order.[4] The police located defendant and brought him back to Sharon's apartment. Defendant returned Sharon's phone, and told the police that he had

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[3] Although the devices purportedly were purchased on behalf of Angels in Flight (AIF), a transportation business that defendant owned with Sharon, Sharon was not aware that AIF used any tracking devices.

[4] In fact, the request for a restraining order was not filed until January 30, five days later.

gone to the apartment to serve paperwork on Sharon. Two of the police officers told defendant not to return to the apartment because Sharon was getting a restraining order against him.

Five days later, on January 30, a letter was posted on Sharon's apartment door, with copies posted on several other doors and walls in the apartment complex. The letter was addressed to "Mr. Man" in "Apartment 6" (i.e., Sharon's apartment). It accused "Mr. Man" of "fooling around with a married woman of 27 years," and tearing apart and destroying her family. It then stated: "Please take this as your very serious only notice: [¶] You will stop at once having anything to do with this married woman, husband, and family. You know that what you are doing is trash wrong and this will not be accepted any further. [¶] This woman shall be allowed to go home to her family without any form of repercussion from you or anyone from your family. This worthless fling that you have with her shall cease immediately and it shall be because you have stopped it. Everyone is expecting for you to do the right thing and this shall be your only notice."

That same day, Sharon went to court to obtain a temporary restraining order against defendant. Sharon's son, Pierre, served the temporary restraining order and notice of hearing for a permanent restraining order on defendant.

A few days later, on February 3, Sharon (who worked as a nurse) went to see a home healthcare patient after finishing an eight-hour shift at her regular job; she picked up Dukes after her shift. While she was driving home with Dukes in her white Nissan Altima, she noticed that a car was following her. She drove to a police station and reported

what had happened; she was told that she should have called 911 while she was being followed, and that there was nothing the police could do at that point.

As Sharon drove out of the police station's parking lot, the police pulled her over and, with their guns drawn, ordered her and Dukes to get out of the car. Earlier that evening, defendant had called 911 and reported that two black men in a white Nissan Altima, with Sharon's license plate number, had flashed a gun and made rude hand gestures toward him. Officers searched Sharon's car and found two loaded firearms (one under the driver's seat and the other under the front passenger's seat) and a bag containing Vicodin pills and marijuana (under the front passenger's seat). Sharon and Dukes were arrested.

Sharon told the police that items found in her car were not hers, and she believed that defendant had planted them.[5] Pierre posted bail for her, and accompanied her back to her apartment. When they arrived, they found the apartment had been broken into, and her computer, some papers, and two guns[6] had been taken, along with Pierre's bag, which contained some watches, cologne and clothes.

Sharon called the police and reported the burglary, including the items that had been taken. At that time, she believed that only one gun had been taken. She later realized that another gun was missing, and

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[5] Sharon testified that defendant had bought the car for her, and had kept a key. The police later confirmed that defendant had made the 911 call about Sharon's car, and ultimately, no charges were filed against Sharon.

[6] The guns were registered to Sharon. The guns that had been found in Sharon's car earlier that night were registered to other people.

she made an additional report. At that time, the police ran her gun registration and found there were two additional guns registered to her: a Springfield XD nine-millimeter handgun and a Smith & Wesson nine-millimeter handgun. When asked about the whereabouts of those guns, Sharon told the police that the Springfield was in defendant's possession (she had left it at the house in Los Angeles when she left defendant), and she had no idea who owned the Smith & Wesson.

On February 23, Sharon's request for a permanent restraining order was heard and granted. The next day, Sharon visited Pierre at his workplace. While there, she and Pierre saw defendant sitting alone, "stooped down," in the back seat of a car in the parking lot. Someone called the police, and Sharon told the responding officers that she had a restraining order against defendant. The officers spoke to defendant and gave him a copy of the permanent restraining order.

B. *The Attempted Murder*

On March 22, Sharon attended a birthday party at her sister Lannie's home, which was five blocks from defendant's house. Dukes dropped Sharon off at the party in Sharon's car, a silver Infiniti, and left in her car. When she was ready to leave, she called Dukes to pick her up.

Within 15 or 20 minutes of receiving the call from Sharon, Dukes was shot while in Sharon's Infiniti outside a liquor store near his mother's house. Someone called 911 to report the shooting at 9:12 p.m. At 9:12:58 p.m., Dukes called Sharon and told her that he had been

shot.[7] Immediately after the call, Sharon began crying and told her son Pierre, "J.J. just shot Jasper." Although at trial Sharon testified that Dukes had said "Dude shot me" during this call, she admitted that she had told an investigator that Dukes had said, "Your husband J.J. just shot me."

Sheriff's deputies arrived at the scene and found Dukes on the ground, wounded and bleeding, and a silver Infiniti parked nearby. There were multiple bullet holes in the driver's door and passenger side window of the Infiniti that appeared to be from bullets fired from outside the car, and there was blood inside. There also were five .40 caliber shell casings on the ground, as well as a laser sight for a handgun.[8] One of the deputies asked Dukes for a description of the person who shot him. Dukes told him it was a "male Black adult"; he did not provide any further identification.

Sharon and members of her family went to the scene and were interviewed by the police. Sharon told one of deputies that defendant

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[7] Investigators subsequently learned that a call was made on defendant's cell phone from the area of the liquor store at 9:11 p.m. Investigators also learned that one of the GPS tracking devices that defendant had bought was at the location of the shooting at the time of the shooting, indicating that it had been attached to Sharon's car.

[8] The laser sight was designed for a Springfield Armory XD nine-millimeter handgun like the one Sharon owned, which she had left at the house when she moved out. A witness from the manufacturer of the laser sight testified that there are specific laser sights for different guns. He explained that if someone put a laser sight for a Springfield Armory XD on a non-Springfield .40 caliber handgun, the laser sight would not fit snugly and would likely fall off, spin, twist, or break when the gun was fired.

had threatened her and Dukes in the past and that she believed he was responsible for the shooting. She also provided defendant's address and a description of his car to Detective Michael Kurinij. Sharon then accompanied Dukes to the hospital in an ambulance.

Within 45 minutes after the shooting, Detective Kurinij went to defendant's house, looking for anything that would require further investigation. There were multiple vehicles at the house, but defendant's car was not there.

The detective ran defendant's DMV records and discovered that defendant had updated his mailing address a week earlier to an address in Compton. He went to the new address, where he found defendant's car behind a gate. He called for a helicopter with an infrared system to examine the car; it was determined that the car was cold, and therefore had not been driven for a while.[9]

Detective Kurinij returned to the scene of the shooting to view the surveillance video from a camera outside the liquor store. The video showed that the Infiniti was parked in front of the store when a silver-gray Nissan sedan stopped next to it, with the driver's side of that sedan closest to the Infiniti. An arm reached out of the driver's window and there were several muzzle flashes. After two or three seconds, the Nissan sped away. The video was too dark to identify the shooter.

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[9] About an hour and a half or two hours later, when two deputies accompanied Sharon to defendant's house so she could check on her children, they saw defendant's car parked at the house next door to his.

Approximately three and a half hours after the shooting, at 1:50 a.m. on March 23, Detective Kurinij interviewed Dukes at the hospital. Dukes identified defendant as the shooter from a photographic lineup. He circled defendant's photograph and wrote "The person who shot me!"; he told the detective that the person who shot him was the "ex-husband or something" of a lady he knew.

Detective Kurinij obtained search warrants for both of defendant's addresses—the Los Angeles house, and the Compton house—which were executed in the early morning hours of March 23. Although the deputies found boxes of nine-millimeter ammunition at the Los Angeles house, they did not find anything that could be related directly to the shooting. Defendant was not at the house.

At around 5:00 a.m. on March 23, the deputies executed the search warrant for the Compton house, which was the home of Darlene Brooks (who had had a relationship with defendant for about two years) and her niece, Katherine Green. Detective Kurinij checked DMV records and discovered that one of the cars Brooks owned was a Nissan Altima; he was told that it was grayish-silver. The Altima was not at the house when the warrant was executed. When asked about the car, Brooks said that she had parked it on the street right outside her house at 5:00 p.m. the night before, and she did not know where it was. She had only one set of keys for the car, which she usually kept on the dining room table.[10]

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[10] Investigators subsequently learned that defendant had been at Brooks' house the evening of March 22, arriving sometime between 6:30 p.m. and 7:30 p.m. Sometime after 9:00 p.m. that night, Brooks' niece saw defendant

Defendant was arrested later that morning during a traffic stop. He was interviewed by Detective Kurinij, and denied shooting Dukes. He was held in custody for about three or four days. While he was in custody, Brooks' Altima was found; it had been set on fire. By the time the fire was put out, the car had completely burned.

Detective Kurinij presented the case to the District Attorney's office, but no charges were filed at that time.

1. *Subsequent Events*

After Dukes was released from the hospital, he moved to Las Vegas. Sharon visited him there several times. When she did, she drove her new car. She had the feeling she was being watched while there, and someone keyed and wrote profanity on her car.

In fact, Sharon *was* being followed. Shelby Hopkins, who had known defendant for several years, ran into defendant in late April, a few weeks after he was discharged from prison. Defendant told Hopkins that he was having some family problems because his wife had cheated; he was angry and hurt. He said he had a "shoot out" at a liquor store with "a guy [who was] messing with his wife," but that "it didn't get handled right." He said that the guy was "a dead man," and offered to pay Hopkins $40,000 or $60,000 to kill him. Hopkins declined.

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drive away from the house in her aunt's Altima. Defendant later admitted to Brooks that he had taken the car; he said he had gotten into an accident and went off the side of the freeway.

Hopkins did, however, agree to go with defendant and one of defendant's sons to Las Vegas to take pictures of Sharon to show that she was cheating on him. They found Sharon through a GPS tracking device; defendant's son used a laptop computer to monitor the device, which was attached by a magnet to the underside of the car.[11] While they were tracking, defendant had Hopkins take the battery out of his cell phone so he could not be tracked.

When defendant saw Sharon with Dukes, he got angry and said that Dukes was "a dead man." Hopkins tried to calm him down, but defendant kept saying that Dukes was "a dead man." Hopkins, defendant, and his son stayed in Las Vegas for a few days, tracking Sharon and Dukes, for which defendant paid Hopkins $200.

On June 1, Sharon saw an email on her AIF account from Rocky Mountain Tracking, which seemed to confirm her suspicions that she was being followed. She brought her car in to be serviced on June 21, and asked that the car be checked for a tracking device. The service repair technician found one. The device had a serial number, and it was determined to be one of the devices that defendant had ordered. On June 29, defendant texted Sharon and asked her to destroy "what [she] found." She ignored that request; the device ultimately was turned over to an investigator who responded to Sharon's call to the District Attorney's stalking hotline.

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[11] Hopkins saw defendant remove one tracking device from Sharon's car and replace it with another; defendant explained to him that he had to do that because the tracking devices ran on a battery that needed to be recharged periodically.

C. *The Murder*

On July 2, defendant called Rocky Mountain Tracking and said he needed a new tracker rushed to him, and that it needed to be activated by the time he got it. He received the device on July 3. Tracking data shows that the device began transmitting at 2:03 p.m. on July 3 at defendant's address, where it stayed until 3:43 a.m. on July 5. At 4:41 a.m., the device started transmitting from Sharon's sister Lannie's address. Sharon and Lannie had switched cars the night before at a Fourth of July family gathering, and Lannie had taken Sharon's car to her house.

At around 6:30 a.m. on July 5, Sharon, who had spent the night with Dukes at a motel in Compton, left the motel, dropped Dukes off at his mother's house, and drove to Lannie's house to pick up her car. After picking up her car, she got on the freeway to head downtown for a court date. While driving, she called Dukes to see if he wanted to use her car while she was in court. When he indicated that he did, she got off the freeway and went back to pick him up, and they both headed to the downtown courthouse. They arrived at the courthouse at around 8:00 or 8:15 a.m.; Sharon got out and Dukes left in her car. Before leaving, Dukes told Sharon that he was going to his nephew's home in Long Beach.

The tracking device that defendant received on July 3 shows transmissions consistent with Sharon's movements once she picked up her car from her sister's house. The transmissions show that after leaving the downtown courthouse, the device travelled to Compton,

where it stayed for approximately 20 minutes, until 8:49 a.m. The device then registered travel to Long Beach, arriving at 1376 Temple Avenue at 9:43 a.m.[12]

A video from a surveillance camera near 1376 Temple Avenue captured the ensuing events. Sharon's car was seen parking on the east curb of Temple Avenue. Dukes exited the car and walked across the street toward the apartment building on the west side of the street. A short time later, a black sedan traveling southbound on Temple Avenue made a U-turn and parked slightly south of Sharon's car. Someone got out from the driver's side of the black car, walked up to Sharon's car and went behind the car, out of sight of the camera. He then returned to the black car, made a U-turn, parked facing southbound for a short time, and then drove southbound out of the view of the camera. Transmissions from the tracking device indicate that during that time period it moved south on Temple and stayed there until 10:26 a.m.

At about that time, the surveillance video showed that Dukes returned to Sharon's parked car. The same black sedan appeared, driving northbound, until it stopped next to Sharon's car. Shots were fired at Sharon's car from the black car, which then drove northbound out of sight of the camera.

Steven Nodwell, who was working in a carport on Temple Avenue that morning, heard two gunshots at about 10:38 a.m.; he was around

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[12] Cell phone data from defendant's phone and Dukes' phone indicate that both phones were being used in the same general area between 8:42 a.m. and 9:00 a.m.; the tracking device was in that same area during that same time period.

25 to 30 yards away. He turned in the direction of the shots and heard someone say "Finish him." He started running toward the car and saw an arm outside a black car shooting a weapon four or five more times, then saw the car speed away going north on Temple.[13] He believed there was a driver and a passenger in the car, with the passenger doing the shooting. He could not see their faces, but believed they were African-American.

Nodwell called 911 and went to give aid to Dukes. Dukes was alive when Nodwell reached the car, but he died shortly thereafter. It subsequently was determined that he was shot nine times and died from multiple gunshot wounds.

Officers who responded to the scene found nine expended nine-millimeter Luger casings. All nine were fired from the same firearm.

During a subsequent search of defendant's house, officers recovered, among other items, an expended nine-millimeter Luger casing. That casing was determined to have been fired by the same gun used to kill Dukes.

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[13] Transmissions from the tracking device that defendant had received on July 3 indicated that the device left the location of the shooting and was moving at high rates of speed on various routes until the transmissions ended at 10:53 a.m. while the device was on State Route 47 in Long Beach. At approximately 11:00 a.m., defendant called Rocky Mountain Tracking to cancel the device and tracking service for the device he purchased on July 2; he agreed to pay a $450 cancellation fee to do so.

D. *The Verdict and Sentence*

Defendant was charged by information with first degree murder (count 1), conspiracy to commit murder (count 2), attempted willful, deliberate, and premeditated murder (count 3), possession of a firearm by a felon (count 4), and stalking (count 5). The information also alleged as to counts 1 and 3 that defendant personally used and discharged a firearm causing great bodily injury or death. The jury found him guilty of all counts and found both firearm allegations to be true.

The trial court sentenced defendant to a total term of 90 years to life computed as follows. On count 1 (murder), the court imposed 25 years to life, plus an additional 25 years to life for the firearm enhancement. On count 2 (conspiracy to commit murder), the court imposed 25 years to life, but stayed the sentence under section 654. On count 3 (attempted murder), the court imposed 15 years to life, plus 25 years to life on the firearm enhancement, to run consecutively with the sentence on count 1. Finally, the court imposed two-year terms on counts 4 and 5, both to run concurrently with the sentence on all other counts.

Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

As noted, defendant raises on appeal three evidentiary issues, the sufficiency of the evidence to support the firearm enhancement on the murder count, and a sentencing error. We address each in turn.

A. *Evidentiary Issues*

Defendant contends the trial court committed reversible error by (1) admitting Dukes' hearsay statement to Sharon identifying defendant as the person who shot him on March 22; (2) admitting Dukes' hearsay statements to Detective Kurinij identifying defendant as the person who shot him on March 22; and (3) precluding defendant from cross-examining Sharon about Dukes' alleged gang membership. None of his contentions have merit.

1. *Dukes' Hearsay Statement to Sharon*

As noted, evidence was admitted that Dukes called Sharon at 9:12:58 p.m. on March 22 and told her that defendant had shot him. Defendant moved to exclude this evidence as hearsay, but the court overruled the objection on the ground that Dukes' statement was admissible as an excited utterance. Defendant contends the trial court abused its discretion by allowing this evidence, and rendered his trial fundamentally unfair, thus violating his right to due process. We conclude the evidence was properly admitted.

"Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) This exception to the hearsay rule is referred to as the spontaneous declaration or excited utterance exception. (*People v. Mota* (1981) 115 Cal.App.3d 227, 234.)

"""To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] Spontaneous statements are deemed sufficiently trustworthy to be admitted into evidence because ""in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."' [Citation.]' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809-810; see also *People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"The decision to admit evidence under Evidence Code section 1240 is reviewed for abuse of discretion. [Citation.] 'Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.] In performing this task, the court "necessarily [exercises] some element of discretion . . . ." [Citation.]' [Citations.]" (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1588-1589; see also *People v. Poggi*, *supra*, 45 Cal.3d at p. 318.)

Defendant argues that admission of Dukes' statement to Sharon was improper because the prosecution failed to present sufficient

evidence to establish that it was made while Dukes was "under the stress of excitement caused by [his] perception" of the shooting. (Citing Evid. Code, § 1240, subd. (b).) In essence, defendant asserts that the prosecution failed to present any evidence to establish how much time had elapsed between the shooting and Dukes' call. Thus, he argues it is possible that sufficient time may have elapsed for Dukes to have recovered from the shock of the shooting and to have time to contrive and misrepresent the identity of the shooter. We disagree.

The prosecution presented evidence from the tracking device that defendant had attached to Sharon's car, which showed that the first transmission at the liquor store location was at 9:09 p.m. The surveillance video showed that the car was parked there when the shooting took place. Cell phone records showed that Dukes called Sharon and told her he had been shot at 9:12:58 p.m. Thus, the evidence establishes that no more than four minutes could have passed between the shooting and Dukes' call to Sharon. Shell casings found at the scene indicate that at least five shots were fired at Dukes, who was hit at least twice.[14] It is reasonable to conclude that someone who had multiple shots fired at him at close range would still be "under the stress of excitement" (Evid. Code, § 1240, subd. (b)) and would not have had """time to contrive and misrepresent""" the events he witnessed less

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[14] During the autopsy of Dukes after he was killed on July 5, two .40 caliber bullets were recovered in addition to the nine-millimeter bullets that were used in the murder. The shell casings found at the scene of the attempted murder on March 22 were .40 caliber.

than four minutes before (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 809).

But even if this short period of time was insufficient by itself to establish that Dukes' statement to Sharon was made "'"while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance"'" (*People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 809-810), there was additional evidence to support the trial court's determination that the excited utterance exception to the hearsay rule applied. First, Sharon testified that Dukes sounded "frantic" when he called her. Second, the inspector from the District Attorney's stalking unit testified that Sharon told him Dukes sounded frantic and as if he was in pain when he called. Finally, one of the deputies who responded to the 911 call at 9:12 p.m. testified that Dukes was excited and seemed to be going into shock when the deputy arrived. All of this evidence, especially when considered along with the timing of Dukes' call, leads us to conclude that the trial court did not abuse its discretion when it found that Dukes' statement to Sharon was admissible under Evidence Code section 1240.

2. *Dukes' Hearsay Statements to Detective Kurinij*

During the cross-examination of one of the deputies who responded to the 911 call on March 22, defense counsel asked about the description Dukes gave him of the shooter. The deputy testified that Dukes told him the shooter was "male Black adult." Counsel asked, "Nothing further—nothing after that, right?" The deputy responded, "Nothing further."

Outside the presence of the jury, the prosecutor argued that, because the defense had elicited Dukes' hearsay statement that identified the shooter only as a Black adult male, all of Dukes' statements identifying the shooter as defendant were admissible under Evidence Code 1202 as inconsistent statements, including Dukes' statements to Detective Kurinij when he identified defendant in a photographic lineup. Defense counsel objected, arguing that the deputy's testimony was not an inadmissible statement under the hearsay rule, and therefore Evidence Code section 1202 did not apply. Finding that the requirements under Evidence Code section 1202 were met, the trial court allowed the statements to Detective Kurinij to be admitted.

When Detective Kurinij testified, the prosecutor played a recording of his interview with Dukes when Dukes was in the hospital after the March 22 shooting. During that interview, Detective Kurinij could be heard explaining to Dukes that he was going to show him a series of six photographs, and asking Dukes to tell him if he recognized anyone who was involved in the shooting. Dukes could be heard identifying the person in photograph number two as the shooter, and Detective Kurinij is heard stating that Dukes circled that photograph, and then wrote something to indicate that that was the person who shot him. Dukes also told the detective that the person who shot him was the "ex-husband or something" of a lady he knew.

After the recording was played for the jury, the prosecutor asked the detective a series of questions confirming that the recording was of his interview and noting that the description Dukes gave to him

differed from the description he had given to the responding deputy. The trial court then gave this instruction to the jury: "Ladies and gentlemen, so you understand, this recording that you just heard of Mr. Jasper Dukes is coming in only for purposes of his credibility as to his statements that were both made previously and to others and made to Officer Kurinij." The prosecutor then showed Detective Kurinij the photographic lineup, which the detective confirmed was the one he had shown Dukes during the interview, and asked him a series of questions about it, confirming that photograph number two, which Dukes had circled, was a photograph of defendant, and that Dukes had written "The person who shot me!" on the lineup card.

During her closing argument, the prosecutor addressed Dukes' statements to Detective Kurinij directly after discussing evidence regarding Dukes' statements to Sharon after he was shot and Sharon's statement to Pierre after the phone call, saying that defendant shot Dukes. The prosecutor stated: "And in addition, we know those statements to be credible because Mr. Dukes gave the same information to Detective Kurinij once he was at the hospital in stable condition. To the very first officer on the scene he didn't give much of a description, 'male Black,' he didn't give further description. But once at the hospital and stable Detective Kurinij interviewed Mr. Dukes and he gave the same information that he gave to Sharon Davis. He specifically described the shooter as the ex-husband of the lady he's been dating and he circled Mr. Davis's photo in the photographic lineup, initialed it, and wrote 'The person who shot me!'" In her rebuttal, the prosecutor again referred to Dukes' later statement (presumably the statement to

the detective) as corroborating Sharon's and Pierre's testimony regarding Dukes' statement to Sharon.

On appeal, defendant contends that the trial court erred in admitting Detective Kurinij's testimony about the interview (he does not challenge the admission of the recording of the interview itself), and that the admission of that testimony violated his constitutional right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36, 68. Relying upon *People v. Hopson* (2017) 3 Cal.5th 424, defendant argues that the detective's testimony was improperly admitted as substantive proof of defendant's guilt because the trial court gave a limiting instruction only as to the recording of the interview and failed to give a limiting instruction after the detective's testimony. He also argues that the prosecutor's argument to the jury that Dukes "circled [defendant's] photo in the photographic lineup, initialed it, and wrote 'The person who shot me!'" demonstrates the testimony was used as substantive evidence of defendant's guilt. We disagree.

Evidence Code section 1202 provides, in relevant part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing."

In other words, under this statute, when a hearsay statement by a declarant who is not a witness is admitted into evidence, an inconsistent hearsay statement by the same declarant is admissible to attack the declarant's credibility. (*People v. Blacksher* (2011) 52 Cal.4th 769, 806; *People v. Corella* (2004) 122 Cal.App.4th 461, 470.) In this case, the defense elicited from the deputy who responded to the 911 call Dukes' out-of-court statement identifying the shooter only as a Black male adult, implying that Dukes did not recognize the shooter. Thus, Dukes' statement was hearsay because it was introduced as proof of the matter asserted, i.e., that Dukes did not recognize the shooter, although it was not inadmissible because it was an excited utterance, having been made immediately after the shooting. Therefore, the prosecution's introduction of Dukes' statement to Detective Kurinij that he did, in fact, recognize the shooter was admissible under Evidence Code section 1202 as an inconsistent statement.

Although defendant is correct that the trial court only gave a limiting instruction after the recording of Detective Kurinij's interview and not after his subsequent testimony, we conclude the limiting instruction that was given was sufficient under the circumstances. On the recording, the jury heard the detective ask Dukes to look at some photographs to see if any of them were of the shooter. They heard defendant identify "number two." They heard the detective ask Dukes to circle the photograph he chose and write that this was the person who shot him, and they heard the detective say that Dukes circled photograph number two, and that Dukes was writing something.

The only testimony Detective Kurinij gave after the jury was instructed was to identify the photograph lineup that had been referenced in the recording and the writing and notations made by Dukes as referenced in the recording. Given the relationship between Detective Kurinij's testimony and the statements in the recording, we conclude that the jury must have understood that the trial court's limiting instruction applied to the testimony as well as the recording.

Moreover, contrary to defendant's assertion, by referring in her closing and rebuttal arguments to Dukes' statements to Detective Kurinij, the prosecutor did not ask the jury to consider those statements for any purpose other than assessing the credibility of Dukes' other hearsay statements.

This case is easily distinguishable from *People v. Hopson*, *supra*, 3 Cal.5th 424, relied upon by defendant. In that case, the Supreme Court held that the admission of a codefendant's statement to a detective violated the defendant's right to confrontation because no limiting instruction was given and the prosecution did not use the statement for a limited purpose. (*Id.* at pp. 433-434.) Because the trial court in the case before us properly gave a limiting instruction and the prosecutor referred to Detective Kurinij's testimony only in a manner consistent with that limiting instruction, we conclude there was no error in the admission of Dukes' statement to Detective Kurinij under Evidence Code section 1202.

3. *Evidence of Dukes' Alleged Gang Membership*

During defense counsel's cross-examination of Sharon, counsel asked about her knowledge of Dukes' gang membership. The trial court sustained the prosecutor's relevance objection.

Later, out of the presence of the jury, defense counsel asked the court to reconsider its ruling, arguing that the gang evidence was relevant to support a theory that Dukes was shot by someone other than defendant. The court asked defense counsel if he had any evidence to offer other than the fact that Dukes was a gang member, had a tattoo, and may have been a shot caller.

Counsel's offer included his assertion that the investigation of the murder began as a gang investigation because of Dukes' reputation as a "significant player" in the Swamp Crip gang. Counsel also noted that an in-law of defendant, who was a member of a gang that was a rival of Dukes' gang, had come forward late in the investigation and told investigators she knew that defendant hired gang members to execute Dukes. Finally, counsel asserted there was a "significant question" about how the people who killed Dukes could have known when Dukes left his nephew's apartment to return to Sharon's car on the morning of the murder.

In response, the prosecutor denied that the murder was ever investigated as a gang murder, and said that defendant was always the suspect. Although she acknowledged that Dukes had been a gang member at some point, she noted that the testimony at the preliminary hearing was that he was an older gentleman who was not an active gang member, let alone a shot caller. She concluded that there was no

evidence to suggest that either shooting was a gang hit, and moved to exclude any gang evidence under Evidence Code section 402. The court granted the motion.

Defendant contends the trial court abused its discretion by precluding the evidence, arguing it was admissible to raise a reasonable doubt as to whether the correct suspect was being prosecuted. We disagree.

"A criminal defendant may introduce evidence of third party culpability if such evidence raises a reasonable doubt as to his guilt, but the evidence must consist of direct or circumstantial evidence that links the third person to the crime. It is not enough that another person has the motive or opportunity to commit it." (*People v. Abilez* (2007) 41 Cal.4th 472, 517; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) The Supreme Court has explained, "'[W]e do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . '[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352).' [Citation.]" (*People v. Robinson* (2005) 37 Cal.4th 592, 625, fn. omitted.) We review the trial court's ruling on third party culpability evidence for abuse of discretion. (*Ibid.* at p. 625.)

In this case, there was no evidence, direct or circumstantial, that defense counsel could point to that suggested Dukes' membership in a gang when he was younger had anything to do with the attempted murder or the murder. Instead, the overwhelming evidence was that

defendant shot Dukes, and later killed him, because he was angry that Dukes was seeing Sharon. Therefore, we find that the trial court did not abuse its discretion in finding that evidence regarding Dukes' gang membership was not relevant, and that even if marginally relevant, its admission would be more prejudicial than probative.

B. *Sufficiency of the Evidence to Support Firearm Enhancement*

Defendant contends the prosecution presented no evidence to prove that defendant was the person who fired the gun that killed Dukes on July 5. Therefore, he argues that the firearm enhancement on his murder conviction must be reversed. We agree.

"The standard of appellate review for determining the sufficiency of the evidence is settled. "'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]'" [Citation.] 'Whether a defendant used a firearm in the commission of an enumerated offense is for the trier of fact to decide. [Citation.] We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

There is no question that there was substantial evidence that defendant was in the black car from which the shots that killed Dukes

were fired. Cell phone records indicate that defendant was in the same area as Dukes and the tracking device that morning, and the surveillance video at the location of the shooting showed that the driver of the black car knew exactly where the tracking device was located on Sharon's car and removed it, indicating that defendant was the driver of the black car. But that evidence does nothing to establish that defendant fired the shots that killed Dukes.

As the prosecutor acknowledged in her closing statement, the evidence showed that the shooter was in the passenger seat, and someone—presumably the driver—yelled "Finish him." Therefore, the prosecutor told the jury that "in that context it would make sense [that defendant] is the driver not the shooter. So you should probably find that allegation not true as to the murder."

In essence, the prosecutor conceded there was insufficient evidence to conclude that defendant personally used and discharged a firearm causing Dukes' death. We agree. Even presuming every fact that reasonably could be deduced from the evidence, there was no evidence from which a reasonable trier of fact could find beyond a reasonable doubt that defendant personally discharged a firearm in the commission of the murder of Dukes. Rather, any such finding necessarily would be based solely on speculation. Accordingly, the firearm enhancement as to count 1 must be reversed.

C. *Sentence on Attempted Murder Count*

At sentencing, the trial court imposed a term of 15 years to life on count 3 for the attempted murder, plus a term of 25 years to life for the

firearm enhancement. In a supplemental appellant's opening brief, defendant argues that the trial court imposed an improper sentence for the attempted murder. The Attorney General concedes that the sentence was improper.

We agree. Under section 664, subdivision (a), the punishment for attempted willful, deliberate, and premeditated murder is life imprisonment with the possibility of parole. Therefore, the sentence will be modified to reflect a sentence on count 3 of life imprisonment, plus 25 years to life on the firearm enhancement.

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DISPOSITION

The true finding on the firearm enhancement as to count 1, the murder, is reversed, and the 25-years-to-life enhancement is stricken. In addition, the judgment is modified as to the sentence on count 3, the attempted murder, to reflect a term of life with the possibility of parole, plus 25 years to life for the firearm enhancement. The trial court is directed to prepare an amended abstract of judgment to include the above modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.